



**PEORIA CITY ATTORNEY  
MEMORANDUM**

**OPINION NO. 2011-03**

**DATE:** October 24, 2011  
**TO:** Bob Barrett, Mayor  
Dave Pearson, Councilmember  
**FROM:** Steve Kemp, City Attorney  
**SUBJECT:** Application of Article III, Sec. 3, Peoria City Charter



The Peoria City Charter provides:

(3) Appoint, promote, remove and demote for cause, subject to rights of appeal, and in compliance with applicable personnel rules and regulations, all officers and employees of the city except the city attorney, and presiding municipal judge, and as to these named officers, he shall recommend appointment and removal; provided, however, that appointments of department directors shall be subject to approval of the city council.

The question has arisen as to what are the responsibilities of the City Council based on the last portion of the sentence of this provision, which states: "provided, however, that appointments of department directors shall be subject to approval of the city council." This is not a common provision of city charters; as a result there are no Arizona cases as to its interpretation and meaning.

In analyzing this question, the rules applied by lawyers in construing statutes provide that:

1. Consider the statute in light of case law interpreting similar statutes based on recognition that the legislature was aware of such case law, when the provision was enacted.<sup>1</sup>
2. Give meaning to all of its provisions.<sup>2</sup>
3. Interpret the statute to avoid an absurd result.<sup>3</sup>
4. Consider the common meaning of the terms used.<sup>4</sup>

1. *Carrow Co. v. Lusby*, 167 Ariz. 18, 21, 804 P.2d 747,750(1990)(Statutes to be construed in accordance with common law, including case law, unless statute clearly indicates a change to case law).
2. *Unum Life Ins. Co. of America v. Craig*, 200 Ariz. 327, 330, 26 P.3d 510, 514(2001) (Court to give meaning to all the provisions in statutes).
3. *State v. Estrada*, 201 Ariz. 247, 251, 34 P.3d 356, 360(2001) (Court to interpret statute to avoid absurd results).
4. *State v. Jones*, 188 Ariz. 388, 392, 937 P.2d 310,314 (1997) (Court to consider the common meaning of the terms used in a statute).

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This issue has been addressed at the federal level through the federal courts interpretation of the provisions providing for the U.S. Senate to give its advice and consent to the President's appointment of certain public officers. Additionally, this matter has been addressed to some extent in a prior opinion rendered by this office, OP. 1992-02, Office of the City Attorney, City of Peoria, Arizona. A copy of this prior opinion is attached as Appendix A to this opinion.

While the term "subject to the approval" is unusual from a statutory perspective; the term "advise and consent" raises the same question and has been more clearly defined. The cases defining "advise and consent" provide guidance to interpreting the terms in the City Charter. The term "advise and consent" has been defined as to treaties it includes Senate involvement in the negotiation process, and the need for a two-thirds majority of the Senate for ratification. As to public officers, the Senate's advice and consent generally includes as the right to vote on approval of an appointment. *Black's Law Dictionary*, (9th ed. 2009).

In looking at this definition it appears that advice and consent is limited to making decisions based on the candidate presented rather than interacting in the selection of potential candidates. *Cogswell v. United States Senate*, US Dist. Ct. (D. Colorado 2009) holds that the United States Constitution commits the power of appointment to the executive branch, with the legislature being involved in giving advice and consent. There are several references to the fact that the actual appointment is completed by the executive branch with the caveat that the appointment is with the advice and consent of the Senate.

The standards under which a legislative body analyzes such appointments and gives its advice and consent are a political matter and beyond the scope of this opinion. See, *Cogswell v. United States Senate*. Rather, the question to be answered is the responsibilities of the City Manager and City Council under the charter.

The Peoria City Charter provides that appointments of department directors shall be subject to approval of the city council. For purposes of interpreting statutory and organic provisions, the first source is the common dictionary definition. Appointment is defined as "the designation of a person, such as a nonelected public official, for a job or duty....Article II of the U.S. Constitution grants the President the Power of Appointment for principal federal officials subject to senatorial consent." *Black's Law Dictionary*, 9<sup>th</sup> edition 2009.

Therefore, the language of the City Charter indicates that the initial power to appoint or designate a person as a department head rests with the City Manager, subject to the approval of council. This interpretation is consistent with the review of similar language in other jurisdictions. See, *State ex rel Brothers v. Zellar*, 3 Ohio App. 2d 43, 209 NE2d 460 (1965) (Appointment is not complete until Governor's appointee is confirmed by State

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Senate); *McBride v. Osborn*, 59 Ariz. 321, 127 P.2d 134 (1942) (Governor's appointee to Industrial Commission is final once confirmed by the Senate).

Unlike other statutes, the Peoria City Charter does not envision direct council participation in the initial appointment process. See, *In re Opinion of the Justices*, 98 NH 530, 98 A.2d 635 (1953) (New Hampshire Supreme Court held appointment was made based on statute providing for appointment by Governor and Council, even if no majority of Council participated). However, nothing in the charter forecloses a City Manager from informing the council as to the steps they have undertaken in the appointment process. Other actions such as public introductions; meet and greet meetings with the community or city staff would be aspects of the appointment process and within the discretion of the City Manager. Such actions are administrative and not legal therefore they are beyond the scope of this opinion.

Rather, it is our conclusion that the power to make an initial appointment of a department head rests with the City Manager, subject to the approval of the City Council. The appointment is not complete until the City Council acts in the affirmative on the appointment. Once the City Council has approved the appointment, it is final and in full effect.

Should you have any further questions, please contact the undersigned.

Sincerely yours,

OFFICE OF THE CITY ATTORNEY  
CITY OF PEORIA, AZ

A handwritten signature in black ink that reads "Stephen M. Kemp". The signature is written in a cursive, slightly slanted style.

Stephen M. Kemp, City Attorney

# APPENDIX A

OFFICE OF THE CITY ATTORNEY

OPINION NO. 92-02

**TO:** Honorable Ken C. Forgia, Mayor  
**FROM:** Stephen M. Kemp, City Attorney  
**DATE:** March 16, 1992  
**SUBJECT:** Renomination and Confirmation of Department Director

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**QUESTION:**

What are the steps to bring back the nomination of a department head where the nomination was previously rejected by the City Council on a 3-3 vote.

**OPINION:**

There are two issues to be resolved in this question. First, can the initial renomination be reconsidered by the City Council, and secondly, can a nomination rejected by the City Council be resubmitted by the City Manager.

Regarding the first question, the Motion to Reconsider may be used to reconsider Council action to reject a nomination submitted by the City Manager. Robert's Rules of Order, 1990 ed. §36 at 310. Generally, this motion must be made at the next meeting following the meeting where the action occurred. In the case of a nomination that was rejected by the Council in late January, 1992, the time for the motion to reconsider would run no later than the first meeting in February.

Therefore a nomination rejected by the City Council may be subject to a Motion to Reconsider that was made at the next Council meeting following the meeting where the nomination was rejected.

The second question as to the power of the City Manager to resubmit the name of a candidate rejected by the City Council presents several issues. The first issue to be resolved in answering the question is to find the legal basis for the officer exercising the power to appoint. The City Charter states:

Section 3. City Manager; Powers and Duties.

The City Manager shall be the chief administrative officer and head of the administrative branch of City government. He shall be responsible for the proper administration of all affairs of the City and to that end, subject to the provisions of this Charter, he shall have power and shall be required to:

\* \* \*

- (3) Appoint, promote, remove and demote for cause, subject to rights of appeal, and in compliance with applicable personnel rules and regulations, all officers and employees of the City, except the City Clerk, City Attorney and City Municipal Judge, and as to these named officers, he shall recommend appointment and removal; provided however, that appointments of Department Managers shall be subject to the approval of the City Council;

The Charter clearly grants the initial decision to appoint a department director to the City Manager. Under this grant of power, the City Council does not have the authority to direct or determine how the initial power to appoint is exercised by the City Manager, nor may the City Manager delegate this power to another person or entity. Taylor v. Crane, 72 Cal.App.3d 791.

The exercise of the power to appoint may be restricted by statute. For example, the Governor may not submit the name of a nominee who has been rejected for confirmation. A.R.S. §38-211. However, no such provision exists in the City Charter.

The duty of Council to consider confirmation occurs after the appointment is made by the City Manager. Rogers v. Frohmler, 59 Ariz. 513, 130 P.2d 271 (1942). Until the City Council exercises its authority to confirm or reject the nominee, the nomination may be withdrawn by the City Manager. As indicated under the Charter, the City Manager is granted the initial powers to appoint. See, Rogers.

Therefore, it is concluded that the initial power to appoint resides with the City Manager. In exercising this power to appoint, the City Manager may submit the name of a candidate for a position who has been previously rejected for confirmation by the City Council.

Should you have any questions, please do not hesitate to contact me.